

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Christopher M. Klein

Chief Bankruptcy Judge

Sacramento, California

September 10, 2013 at 1:30 p.m.

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1. [12-41876](#)-C-13 ALAN/BEVERLY HILL MOTION FOR RELIEF FROM
MRG-1 AUTOMATIC STAY
8-12-13 [[105](#)]
U.S. BANK, N.A. VS.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on August 12, 2013. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Chapter 13 Trustee and Debtor filed response and opposition and the court will take up the merits of the motion. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's tentative decision continue the hearing on the Motion for Relief from the Automatic Stay to [date] at [time]. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

U.S. Bank, N.A. seeks relief from the automatic stay with respect to the real property commonly known as 8057 Churn Creek Road, Redding, California. The moving party has provided the Declaration of Mark McCloskey to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The McCloskey Declaration states that the Debtor has not made 4 post-petition payments, with a total of \$9,142.27 in post-petition payments past due. From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this property is determined to be \$691,942.04 (including \$685,038.08 secured by movant's first trust deed), as stated in the McCloskey Declaration, while the value of the property is determined to be \$425,000.00, as stated in Schedules A and D filed by Debtor.

U.S. Bank, N.A. moves only pursuant to 11 U.S.C. § 362(d)(1) and

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argues that its interest is not adequately protected because Debtors did not make post-petition payments. The existence of missed payments by itself does not guarantee relief from stay. However, the court maintains the right to grant relief from stay for cause when the debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

The Chapter 13 Trustee and Debtor filed responses to U.S. Bank, N.A.'s Motion.

Chapter 13 Trustee's Response

The Chapter 13 Trustee responds to U.S. Bank, N.A.'s motion and asserts that, based on the history of Debtors' payments, Debtors are delinquent \$5,600.00 under the confirmed plan. The Debtors have paid a total of \$16,800.00 to date. The Trustee requests the court consider these facts.

Debtors' Opposition

Debtor opposes U.S. Bank, N.A.'s motion on the following grounds:

If U.S. Bank, N.A. is granted relief from the stay and moves to foreclose, it will be violating the dual tracking prohibition included in the California Homeowner Bill of Rights. Cal. Civ. Code § 2923.6(c)-(d). Debtor argues a loan modification application is currently under consideration (pending since January 27, 2013). A statement from Debtors' loan servicer, Specialized Loan Servicing, states that as of March 11, 2013, Debtors' loan was under reconsideration for a loan modification. Dkt. 114.

Based on the information provided to the court, there is not sufficient conclusive evidence to find that relief from the stay is appropriate at this time. Movant provides evidence in the form of the McCloskey declaration and correspondence from Movant's counsel to Debtors' counsel stating that Debtors are past due \$9,142.27 in post-petition payments. Meanwhile, the Chapter 13 Trustee submits his accounting of Debtors' payments into the plan and states that overall, Debtor is delinquent \$5,600.00 under the confirmed plan.

From the evidence presented to the court, it is not clear how delinquent Debtors are to U.S. Bank, N.A. U.S. Bank, N.A., in the McCloskey declaration, generally claims that Debtors did not make four post-petition payments; however, the declaration only specifically states missed payments from April 2013 and July 2013. Trustee asserts that Debtor is delinquent \$5,600.00 under the plan. U.S. Bank, N.A. needs to provide the court more conclusive evidence of Debtors' delinquency. The court needs to know the status of Debtors' pending loan modification application. The most recent document stating Debtor is under review dates from March 2013. Whether the Debtor has been denied a modification or granted a trial payment plan can affect the outcome of Movant's motion.

Therefore, the court will continue the hearing on the Motion to [date] at [time] to allow U.S. Bank, N.A. to submit clear and definite evidence of Debtors' delinquency and to permit Debtors to obtain a more recent written statement on the status of their pending loan modification.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the court will continue the hearing on the Motion for Relief from the Automatic Stay to **[date]** at **[time]**.

2. [12-21767](#)-C-13 JOHN/TAMMIE FLETCHER CONTINUED MOTION TO DISMISS
TSB-1 Scott CoBen CASE
8-7-13 [\[41\]](#)

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on August 7, 2013. 28 days' notice is required. That requirement was met.

Tentative Ruling: The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's tentative decision is to grant the Motion to Dismiss and dismiss the case. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

At the September 4, 2013 hearing, the court continued the hearing on the Motion to Dismiss for the court to be presented with evidence of whether payment was made to the Trustee by the close of business on September 3, 2013 as represented by Debtors' Counsel at the September 4, 2010 hearing. The Chapter 13 Trustee reported at the hearing that he had no record of a September 3, 2013 payment.

The Chapter 13 Trustee moved to dismiss Debtors' case on the following grounds:

The Trustee argues the plan will complete in 257 months, as opposed to 60 months proposed. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d) and places Debtor in material default of plan terms. Debtor did not value the second deed of trust held by

CitiFinancial Services, Inc.

Furthermore, it appears Debtors cannot make payments required under 11 U.S.C. § 1325(a)(6) because Debtors are delinquent \$2,150.00 under the terms of the plan confirmed.

Debtors' Response

Debtors Objected to Trustee's Motion to Dismiss on the following grounds:

(1.) Debtors filed a Motion to Value Collateral of CitiFinancial Services, Inc. It is set for hearing on September 17, 2013.

(2.) Debtors will have their plan payment current prior to the hearing on the Motion to Dismiss.

The Debtors offer no evidence as to why the defaults occurred, why future defaults are not likely, and how the Debtors can have "extra" income to cure prior defaults when they are already providing all of their projected disposable income to fund the monthly payments. On Schedule I the Debtors state under penalty of perjury that their Average Monthly Income is \$6,577.00. Dckt. 1 at 25. The only deductions taken from the income is \$957.00 for payroll taxes and Social Security from Mr. Fletcher's wages. No deductions are provided on Schedule I for Mrs. Fletcher's \$2,500.00 a month business income. Schedule J lists \$4,427.00 in expenses for the Debtors. Id. at 26. No provision is made for the payment of any income or self employment taxes for the \$2,500.00 a month in self employed business income for Mrs. Fletcher. No provision is made for the payment of any real property taxes on Schedule J, but it is stated that they are not included in the monthly mortgage payment. The Monthly Net Income stated under penalty of perjury on Schedule J is \$2,150.00.

The Chapter 13 Plan requires that the current monthly mortgage payment of \$1,680.00 and an arrearage payment of \$255.00 is to be paid to Bank of America, N.A. on its Class 1 secured claim. No provision is made in the Plan for payment of property taxes.

The Debtors have not provided the court with a satisfactory explanation concerning the monetary default and their ability to continue under the Plan. The default has demonstrated that the Plan is based on faulty "financial logic" and is unlikely to succeed. To the extent that the Debtors have "extra money" to cure defaults and pay the expenses not listed on Schedule J (such as property taxes, self-employment taxes, and income taxes from the self-employed income), then either the Debtors have undisclosed income or have falsely stated under penalty of perjury their expenses.

Cause exists to dismiss this Chapter 13 case. The motion is granted and the case is dismissed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is granted and the case is dismissed.